UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

BIRNIE BUS SERVICE, INC.

Case No. 3-CA-25601

and

TEAMSTERS LOCAL 1149

Alfred M. Noreck, Esq., for the General Counsel. Raymond J. Pascucci, Esq. (Bond, Schoeneck & King, PLLC,) of Syracuse, New York, for the Respondent.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Albany, New York, on March 13, 2006. The Union, Teamsters Local 1149, filed the charge giving rise to this matter on October 7, 2005. Based on that charge, the General Counsel issued the instant complaint on January 31, 2006.

The General Counsel alleges that Respondent, Birnie Bus Service, Inc., violated Section 8(a)(5) and (1) of the Act by unilaterally suspending, for employees who were represented by the Union, its practice of implementing annual wage increases. The parties agree that wage increases were implemented for these employees in December 2005, after Respondent had withdrawn recognition from the Union.

The General Counsel also alleges that Respondent, by terminal manager Leo Naylor, violated Section 8(a)(1) in September 2005, by telling employees that they would not receive their annual wage increase because they had selected the Union as their collective bargaining representative.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with headquarters in Rome, New York, provides bus transportation services in central New York State, where it annually receives revenue in excess of \$250,000. For a few years prior to October 21, 2005, it operated a facility at Bouckville, New York at which it received goods and services valued in excess of \$10,000 from places outside of the State of New York. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Local 1149 of the International Brotherhood of Teamsters, is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

In April 2005, the Union was certified as the exclusive collective bargaining representative of all full-time and regular part-time bus drivers at Respondent's Bouckville, New York facility. Respondent and the Union met in collective bargaining negotiations on June 14, July 12 and August 16, 2005. On September 27, 2005, Respondent informed the Union that it was closing the Bouckville terminal and that the employees would be transferred to Respondent's Hamilton, New York terminal. On September 30, 2005, Respondent, by letter, informed the Union that since the Hamilton workforce was greater than the Bouckville workforce "your representation of Bouckville employees may cease once consolidation takes place, GC Exh. 9."

On October 21, 2005, Bouckville employees began driving out of the Hamilton terminal. Afterwards, Respondent withdrew recognition of the Union as collective bargaining representative of the employees who formerly worked at Bouckville. The Union filed an unfair labor practice charge that covered the withdrawal of recognition. However, the General Counsel dismissed this allegation of the charge.

Bouckville was one of approximately a dozen bus terminals operated by Respondent in central New York State. There were approximately eleven bus drivers in the Bouckville bargaining unit. Only one of Respondent's terminals, the Syracuse terminal, which has about 140 employees, was organized prior to April 2005. The approximately 730 employees at the other eleven terminals have, for at least several years, received annual pay raises in September of each year, or upon the anniversary date of the opening of the terminal (Tr. 93-95).

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In September 2004, Respondent changed somewhat the manner in which it evaluated employee performance for the purpose of pay adjustments at its non-union terminals. However, it is unclear whether this evaluation process changed in any material sense. Prior to 2004 employees were evaluated on a point system by which they were rated on different areas of their job duties, (Tr. 94-95). Starting in 2004, Respondent apparently abandoned the point system and appraised employees on such factors as attendance, appearance, safety, attitude, courtesy and customer relations (Tr. 94). The range of pay adjustments appears to have stayed the same (Tr. 32, 38, 94, 95).

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At most terminals, including Bouckville, a supervisor evaluated employees in August and pay raises became effective in September. These increases typically ranged from 2-4%. Most employees received a 3-3 ½ % wage increase. Fifteen to twenty employees received no increase.

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In August or September 2005 all employees at Respondent's non-union terminals were evaluated. All these employees, except for the 15-20 mentioned previously, received wage increases in September (or the anniversary date of the terminal), except for the employees at Bouckville. Respondent did not adjust the Bouckville employees' wages on the grounds that it was engaged in collective bargaining negotiations with the Union. Respondent did not notify the Union that it was suspending the annual pay raise for represented employees.

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Some employees at the Bouckville terminal asked terminal manager Leo Naylor in September whether they were getting a raise that month. Naylor told them that, "based on my experience with the Syracuse terminal and the Union negotiations, which [were on going] at the time, they weren't going to receive any raises until after it was all done (Tr. 59)."

Sometime after the Bouckville employees transferred to Hamilton, Naylor told them that they would be receiving their pay raises retroactive to September because "the Union thing was gone." The employees received the pay adjustment, retroactive to September, in December 2005 (Tr. 60-61).

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Analysis and Conclusions of Law

Respondent violated Section 8(a)5) and (1) by suspending its annual wage adjustment in September 2005 for bargaining unit employees.

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It is settled law that when employees are represented by a labor organization, their employer violates Section 8(a)(5) by unilaterally changing their terms and conditions of employment, such as their wages or their wage system, regardless of the employer's motive, *NLRB v. Katz*, 369 NLRB 736, 747 (1962). During negotiations, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole, *Bottom Line Enterprises*, 302 NLRB 373 (1991).

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When an employer has an established practice of granting wage increases according to fixed criteria at predictable intervals, a discontinuance of that practice constitutes a change in terms and conditions even if the amount of the increases has varied in the past, *Daily News of Los Angeles*, 315 NLRB 1236, 1237-1241 (1994), enfd. 73 F. 2d 406 (D.C. Cir. 1996).

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There are exceptions to the rule enunciated in *Bottom Line Enterprises*. One of these involves a situation in which an employer, during negotiations, notifies the Union of its intention not to apply its practice of making annual wage adjustments to unit employees, and the Union fails to request bargaining over the decision, *TXU Electric Co.*, 343 NLRB No. 132 (2004). However, *TXU Electric* is irrelevant to the instant case because Respondent did not notify the Union of its intention not to grant its annual wage adjustments to unit employees (Tr. 98).

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The facts in the instant case are materially indistinguishable from those in *Daily News* and in *Rural/Metro Medical Services*, 327 NLRB 49 (1998) another case in which the Board found that the employer violated Section 8(a)(1) in threatening to withhold merit increases. In *Daily News* the employer had taken over its predecessor's operations on January 1, 1986 and granted merit salary increases varying in amount based on each employee's annual performance review. These reviews were performed on the anniversary of the employee's date of hire. In 1986, 1987, 1988 and possibly in 1989, some employees received merit increases in varying amounts based on their performance review and some received no increase, *Daily News of Los Angeles*, 304 NLRB 511 at 514 (1991). The Board found that the Daily News' merit increases were an established condition of employment and that the Daily News unlawfully threatened to withhold such increases after the Union's certification in 1989.

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Similarly, in *Rural/Metro Medical Services*, the employer had only been operating for two years when the Union filed its petition to represent a unit of its employees. Shortly thereafter, the employer issued a memo stating that if the Union prevailed in the representation election it would withhold merit increases that it had awarded annually to employees based on their

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¹ On some printed versions of the *TXU Electric* decision, the cite is listed as 343 NLRB No. 137.

performance reviews. Merit increases in the prior two years were awarded entirely at the employer's discretion and ranged from 8% to zero. The Board held that since the employer's merit increase program called for increases on a specific schedule and used specific criteria (the employee's evaluation) the employer was required to maintain the merit increase program unless a change was negotiated with, and agreed to, by the Union, or the parties reached impasse after good-faith bargaining.

Respondent's brief suggests that its failure to implement a wage adjustment in September for Bouckville employees is somehow excused by the fact that the Union never asked it do to so. The law doesn't require a union make such a proposal in the absence of any indication from the employer that it does not intend to conform to past practice with respect to a unionized facility.

Respondent's argument that it had no past practice because there was only a one year history of wage adjustments at "the Bouckville terminal" is a bit disingenuous. The record is clear that employees working in Bouckville, albeit not from a terminal, received performance-based wage increases prior to 2004 in September (Tr. 97). Not only that, but it is also clear that this was the practice at every non-unionized terminal. The fact that Respondent slightly changed its manner of assessing employee performance in 2004 does not affect Respondent's obligations under Section 8(a)(5). Moreover, the record is absolutely clear that Bouckville employees would have received performance-based wage increases in September 2005 had Respondent not been engaged in collective bargaining negotiations with the Union.

In conclusion, Respondent's failure to adjust unit employees' wages in accordance with its established practice violated Section 8(a)(5) and (1). Consequently, Terminal Manager Leo Naylor's statement to employees that they were not getting this adjustment due to collective bargaining negotiations violated Section 8(a)(1), *Lamonts Apparel*, 317 NLRB 286, 288 (1995).

Summary of Conclusions of Law

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- 1. Respondent violated Section 8(a)(5) and (1) by unilaterally suspending or delaying bargaining unit employees' pay increases during collective bargaining negotiations in September 2005.
- 2. Respondent, by Leo Naylor, violated Section 8(a)(1) by telling employees that they would not be receiving their annual pay adjustment while collective bargaining negotiations were ongoing.

Remedy

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Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Birnie Bus Service, Inc., Rome, New York, its officers, agents, successors, and assigns, shall

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1. Cease and desist from

- (a) At a time when the International Brotherhood of Teamsters, Local 1149, or any other union, represents a unit of its employees, making unilateral changes to established past practices, such as suspending or delaying scheduled annual pay increases, during collective bargaining negotiations for an initial contract.
- (b) Telling represented employees that they will not receive pay increases, which are established past practices, due to ongoing collective bargaining negotiations for an initial contract.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - 2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days after service by the Region, post at its Hamilton, New York terminal, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.
- (b) In addition, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at it Bouckville, New York terminal any time since September 1, 2005.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., April 21, 2006.

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Arthur J. Amchan
Administrative Law Judge

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³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the National Labor Relations Board An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union Choose representatives to bargain with us on your behalf Act together with other employees for your benefit and protection Choose not to engage in any of these protected activities

WE WILL NOT, at a time when the International Brotherhood of Teamsters, Local 1149, or any other union, is your collective bargaining representative, unilaterally suspend or delay payment of scheduled pay increases, which are established past practices, due to ongoing collective bargaining negotiations for an initial contract.

WE WILL NOT, at a time when the International Brotherhood of Teamsters, Local 1149, or any other union, is your collective bargaining representative, tell you that you are not receiving a scheduled pay increase, which is an established past practice, due to ongoing collective bargaining negotiations for an initial contract.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE HAVE PAID employees who were represented by the International Brotherhood of Teamsters, Local 1149 at our former Bouckville, New York facility, the pay increases that were due to them in September 2005, retroactive to that date.

WE WILL, on request, at any time that the International Brotherhood of Teamsters, Local 1149, or any other union, is your collective bargaining representative, bargain with the Union and put

in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

		BIRNIE BUS SERVICE, INC. (Employer)	
Dated	By		
		(Representative)	(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

111 West Huron Street, Federal Building, Room 901

Buffalo, New York 14202-2387

Hours: 8:30 a.m. to 5 p.m. 716-551-4931.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.